In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1048

LATIC KEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A fourteen-count information charged petitioner and four co-defendants with unlawfully dispensing and causing to be dispensed misbranded drugs, in violation of 21 U.S.C. 331(k) and 353(b)(1)(B). After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on all counts. On December 21, 1965, he was sentenced to imprisonment for one year on counts 11, 12, and 14, to run consecutively, and fined $500

on each of counts one to ten; on count thirteen petitioner was placed on probation for four years, to run consecutively to the term of imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A.).

The evidence showed that petitioner was the owner of a diner located at the intersection of three highways near Newport, Tennessee (G. 2b).[1] On four occasions between October 19 and December 4, 1964, Food and Drug Inspectors, accompanied by a special employee, Howard Shaver, purchased amphetamine hydrochloride tablets at the diner. The tablets were packaged in coin wrappers which bore no labelling other than a numeral (G. 2b-8b). On the first three occasions the sales were handled by petitioner's wife and three waitresses in petitioner's employ. On December 4, petitioner personally conducted several sales (counts 11, 12 and 14). On October 8, 1965, an information was filed charging petitioner, his wife and the waitresses with illegally dispensing the drugs.[2] Trial was held on November 17-18, 1965. Two weeks before trial, defense counsel filed a motion for a bill of particulars, requesting three items of information, including the time of day of each offense and the names and addresses of all individuals present when the transactions were made (A. 17a-18a). The government filed its reply the next day. It

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[1] Citations are to the Appendix for Plaintiff-Appellee ("G") and Appendix for the Defendant-Appellant ("A"), filed with the Clerk of this Court.

[2] Petitioner's wife and the three waitresses were tried jointly with petitioner. They were convicted and received suspended sentences.

stated the names and addresses of Mr. Shaver and the five government inspectors who had participated in the transactions, but did not list the time of day of each offense (A. 19a). No requests for further information were filed.

At the commencement of trial, defense counsel advised the court that, in his opinion, the government's reply to his bill of particulars was inadequate. He requested that the government disclose whether it was alleging that petitioner was physically or merely constructively present when the sales were made, and whether the individuals listed by the government as being present had used their proper names when effecting the purchases (A. 31a-32a). The court did not make a formal ruling on petitioner's request for more information, but asked the agents and the special employee whether they had used a fictitious name or alias. Each replied that he had used his correct name (A. 32a-33a). The court then asked trial counsel about the time of day of each transaction, and counsel volunteered the information (A. 33a-34a). The prosecution also indicated that it would contend that petitioner was physically present only as to counts 10-14 (A. 34a). Defense counsel then asserted that this information came too late to be of use to him, and he requested a continuance. The court denied the request (A. 35a-36a). This denial is petitioner's sole ground for urging review in this Court. The claim obviously has no merit.

The government's response to petitioner's written motion for a bill of particulars gave petitioner the

essential information regarding the persons participating in the offense. The lateness of the oral application for more information was never explained, and the request could properly have been denied on that ground. The information which the court then elicited from the prosecutor, who apparently was willing to provide it on request, related to unimportant details, not substantial enough to warrant a continuance of the trial. Although petitioner now claims that the denial of a continuance violated his constitutional rights, he made no such claim in his motion for a new trial (A. 22a), and he has never indicated how the granting of a continuance would have changed his defense tactics. Under these circumstances, the denial of a continuance was not an abuse of discretion and does not warrant further review. *Isaacs* v. *United States*, 159 U.S. 487; *Avery* v. *Alabama*, 308 U.S. 444; *Ungar* v. *Sarafite*, 376 U.S. 575; *Jackson* v. *United States*, 330 F. 2d 445 (C.A. 5), certiorari denied, 379 U.S. 821; *Torres* v. *United States*, 270 F. 2d 252 (C.A. 9), certiorari denied, 362 U.S. 921.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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